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DOPAG DOSIERTECHNIK UND PNUEMATIK AG v. GAMEL NASIR TAIB & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA J
[SUIT NO: 22NCVC-74-02-2015]
B 15 FEBRUARY 2017

CIVIL PROCEDURE: *Injunctions – Mareva injunction – Pre-judgment Mareva injunction – Application to extend – Whether court seized with power to order extension of interlocutory Mareva injunction post judgment – Whether necessary to aid in execution of judgment – Whether extension of Mareva injunction would be perpetual injunction contravening s. 54 of Specific Relief Act 1950 – Whether application an abuse of process – Whether there was real risk of dissipation of assets – Rules of Court 2012, O. 29, O. 45 & O. 92 r. 4*

D At the interlocutory stage of the proceedings, the plaintiff applied, *vide* encl. 10, for a pre-judgment *Mareva* injunction against the first and second defendants, which was granted. The terms of the *Mareva* injunction order include, *inter alia*, that the first and second defendants were restrained from withdrawing money from their bank accounts, apart from their permitted monthly withdrawals of RM15,000 and RM10,000 respectively for their E monthly expenses, and that both defendants were restrained from dissipating their assets up to the value of RM4.3 million. The duration of the *Mareva* injunction order was until full disposal of the plaintiff's suit or until further order of the court. Subsequently, after a full trial, a judgment was granted for the plaintiff against the first and second defendants, wherein the first and F second defendants were found to have breached their statutory and fiduciary duties as directors of the fifth defendant, which had caused loss and damage to the fifth defendant. Pursuant to the judgment, the first and second defendants were ordered to pay the fifth defendant, amongst others, the sum of RM5,411,050.10 and costs of RM90,000. Thereafter, in aid of execution G of the judgment, the plaintiff applied *via* notice of application (encl. 140) for the *Mareva* injunction to be extended for a period to be determined by the court. The grounds for that application was, *inter alia*, that there was a great risk that the assets of the first and second defendants would be removed from the jurisdiction of this court and dissipated thus frustrating the execution of H the judgment. The first and second defendants opposed to this application, essentially, on the grounds (i) that the plaintiff's application, which was premised on O. 29 of the Rules of Court 2012 ('ROC') could not be sustained because the said provision did not provide for any post-judgment extension of an injunction of this nature; (ii) the extension of the *Mareva* injunction would in effect be a perpetual injunction and that such an injunction I contravened the provisions of s. 54 of the Specific Relief Act 1950; (iii) the

application was an abuse of process on grounds that the plaintiff ought to avail itself of the various methods of execution of the judgment as set out in O. 45 of the ROC instead of seeking this post judgment injunction; and (iv) the plaintiff had failed to establish the all important element of risk of dissipation of assets by both defendants for the grant of a *Mareva* injunction.

Held (allowing application):

(1) A *Mareva* injunction could not only be granted at the interlocutory stage but may also be granted post judgment. This court has the statutory power to grant such an injunction by virtue of the provisions of s. 6 of the Schedule to the Courts of Judicature Act 1964. The court also has inherent powers by virtue of O. 92 r. 4 of the ROC to make any order as may be necessary to prevent injustice, and that would include the grant of a post-judgment *Mareva* injunction. Thus, the court was seized with power to order the extension of an interlocutory *Mareva* injunction after judgment. There was no necessity to make a fresh application for a post judgment injunction. (paras 8 & 9)

(2) The extension of the *Mareva* injunction is to aid in execution of the judgment. Therefore, when the judgment is satisfied, the injunction will stand to be dissolved. Herein, a large part of the judgment concerned the funds of the fifth defendant that was paid out to both defendants in breach of their statutory and fiduciary duties. There was unjust enrichment on the part of the defendants. Thus, the defendants were liable to account for these funds and disgorge them to the fifth defendant. As the order sought was subject to any further order of the court, it could not be said to be a perpetual injunction that would be subservient to the statutory constraints of s. 54 of the Specific Relief Act 1950. (para 10)

(3) A post judgment *Mareva* injunction that acts *in personam* against the defendants is quite apart from the execution proceedings envisaged in O. 45. Both the post judgment *Mareva* injunction and execution proceedings can co-exist to the extent that they serve the ends of justice. The fifth defendant, being the judgment creditor, was the proper party to execute the judgment and not the plaintiff. However, the plaintiff could not execute the judgment as the plaintiff had not regained control of the fifth defendant. The first and second defendants were still in control of the Board. Once the plaintiff could regain control of the fifth defendant, execution proceedings would be promptly issued. Therefore, this application for the *Mareva* injunction to continue was necessary to aid in the execution of the judgment now and after the plaintiff regained control of the company. (paras 12 & 13)

(4) There was a real risk of dissipation of assets on the part of the first and second defendants when the court granted the *Mareva* injunction. The matters raised by the plaintiff as giving rise to the risk of dissipation on affidavit at the interlocutory stage have been further established by *viva vorce* evidence at trial. Thus, the risk of dissipation was more real. In any event, the risk of dissipation of assets could clearly be presumed from the first and second defendants' lack of probity and dishonest conduct in dealing with the assets of the company. (paras 14 & 15)

(5) The conduct of the first and second defendants in bringing about large losses to the fifth defendant arose from their blatant disregard and breach of statutory and fiduciary duties owed to the fifth defendant. Large sums of money belonging to the fifth defendant were paid out unlawfully to both the first and second defendants. These unlawful conducts of the first and second defendants fortified the plaintiff's contention that there was apparent risk of assets being dissipated. Further, the judgment had ordered the first and second defendants to pay damages amounting to RM5.4 million to the fifth defendant. Affidavits deposed by both defendants showed that they both had collective cash assets of only RM3.5 million. Thus, *prima facie* the risk of dissipation of their assets becomes greater given that judgment had been entered against them and they have been ordered to pay substantial damages. Thus, the plaintiff had made out a very good case for the *Mareva* injunction to be extended. (paras 16 & 17)

Case(s) referred to:

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 CA ***(refd)***

Multi-Code Electronic Industries (M) Bhd & Anor v. Gordon Toh Chun Toh & Ors [2009] 9 CLJ 659 HC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagjibha Patel & Ors [2004] 7 CLJ 465 HC ***(refd)***

Robert Doran & Ors v. Kuan Pek Seng & Ors [2010] 6 CLJ 105 HC ***(refd)***

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

Seema Development Sdn Bhd v. Mah Kim Chye & Anor [1998] 1 CLJ 174 HC ***(refd)***

Stewart Chartering Ltd v. C & O Managements SA and Others, The Venus Destiny [1980] 1 WLR 460 ***(refd)***

Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 150

Courts of Judicature Act 1964, Schedule s. 6

Rules of Court 2012, O. 29 r. 1(1), O. 45, O. 92 r. 4

Specific Relief Act 1950, s. 54

Other source(s) referred to:
Malaysian Civil Procedure, vol. 1, Sweet & Maxwell, 2015, p. 404

For the plaintiff - G Vijay Kumar & Chan Mun Yew; M/s Lee Hishamuddin Allen & Gledhill
For the 1st & 2nd defendants - Esther Geetha Jayaraja & Tan Yee Chian; M/s Chew Das & Jayaraja

Reported by Suhainah Wahiduddin

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] The plaintiff had at the interlocutory stage of proceedings applied *vide* encl. 10 for a pre-judgment *Mareva* injunction against the first and second defendants, which I granted on 8 July 2015. The terms of the *Mareva* injunction order against the first and second defendants include, *inter alia*, that the first and second defendants are restrained from withdrawing money from their bank accounts, apart from their permitted monthly withdrawals of RM15,000 and RM10,000 respectively for their monthly expenses, and that both defendants are restrained from dissipating their assets up to the value of RM4.3 million. The duration of the *Mareva* injunction order was until full disposal of the plaintiff's suit or until further order of the court.

[2] I had on 11 August 2016 granted judgment for the plaintiff against the first and second defendants after full trial, wherein I found that the first and second defendants had breached their statutory and fiduciary duties as directors of the fifth defendant, which had caused loss and damage to the fifth defendant. The first and second defendants were pursuant to the judgment, among others, ordered to pay the fifth defendant the sum of RM5,411,050.10 and cost of RM90,000.

[3] Thereafter, in aid of execution of the judgment, the plaintiff applied *via* notice of application dated 8 September 2016 (encl. 140) for the *Mareva* injunction dated 8 July 2015 to be extended for a period to be determined by the court or until further order of the court. The grounds for that application is *inter alia* that there is a great risk that the assets of the first and second defendants would be removed from the jurisdiction of this court and dissipated thus frustrating the execution of the judgment.

[4] The first and second defendants opposed the application. After hearing arguments, I allowed the application in encl. 140. My reasons for that decision are as follows.

[5] The first and second defendants oppose this application essentially on three grounds, namely, that:

(a) the application is completely baseless, without merit frivolous and an abuse of process;

(b) the application is essentially for a permanent injunction which would contravene s. 54 of the Specific Relief Act 1950; and

(c) the plaintiff failed to prove real risk of dissipation of assets.

[6] The first and second defendants argue that the plaintiff's application, which is premised on the provisions of O. 29 of the Rules of Court 2012 ("ROC"), cannot be sustained because O. 29 of the ROC does not provide for any post-judgment extension of an injunction of this nature. Notwithstanding this argument, the first and second defendants further contend that if the plaintiff were desirous of seeking a post-judgment injunction in aid of execution, then the plaintiff ought not to be allowed to refer back to the earlier *Mareva* injunction order for its terms to be similarly couched, and that it ought to be a fresh application altogether.

[7] I am unable to accept these arguments. A *Mareva* injunction can be granted post-judgment and if such an injunction had been granted at the interlocutory stage it can be extended post-judgment to aid in the execution of the judgment. In *Seema Development Sdn Bhd v. Mah Kim Chye & Anor* [1998] 1 CLJ 174 the plaintiff had applied for a post-judgment *Mareva* injunction and Abdull Hamid Embong J (later FCJ) held that:

> Order 29 r. 1(1) of the Rules of the High Court provides that an application for grant of an injunction may be made before or after the trial of a cause or matter. That this court is seised with the power to now grant this injunction is well illustrated in *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097 where it was held that the court had the power to grant an interlocutory injunction between final judgment and execution. Farquharsan J at p. 1100 further held that a *Mareva* injunction may be used to aid execution. His Lordship stated:
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> > If there is such a power, there seems to be no logical reason why a *Mareva* injunction should not be used in aid of execution. Indeed, in one sense it could be said that there is greater justification for restraining a defendant from disposing of his assets after judgment than before any claim has been established against him. It is true that there is a variety of methods for enforcing execution as set out in RSC O. 45 r. 1 and once the plaintiff has obtained judgment it may be said that he should pursue the remedies provided by the rules rather than extend the application of *Mareva* injunctions still further. The answer to that objection is that, as has been frequently pointed out, the *Mareva* injunction acts *in personam* on the defendant and does not give the plaintiff any rights over the goods of the defendant nor involve any attachment of them. In this context it would have the effect

> of preserving the defendant's goods until execution could be levied upon them; and the remedies of injunction and execution can take effect side by side. Such was the view of Robert Goff J in *Stewart Chartering Ltd. v. C & O Managements SA* [1980] 1 WLR 460 where he continued a *Mareva* injunction granted before judgment in aid of execution. Plainly an injunction will only be granted where the plaintiff can adduce evidence of a kind which normally supports an application for a Mareva injunction, namely, that there are grounds for believing that the judgment debtor will dispose of his assets to avoid execution.
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> Perhaps such grounds may be more readily established after judgment than before it. The present application was therefore granted.

Further, in *Stewart Chartering Ltd v. C & O Managements SA and Others, The Venus Destiny* [1980] 1 WLR 460, which was quoted by Abdull Hamid Embong J in the above case and referred to in the *Malaysian Civil Procedure*, Vol. 1, Sweet & Maxwell, 2015 at p. 404, Robert Goff J (as he then was) held:

> The purpose of a *Mareva* injunction order is to prevent a defendant from removing his assets from the jurisdiction so as to prevent the plaintiff from obtaining the fruits of his judgment; from this it follows that the policy underlying the *Mareva* injunction can be given effect to if the court has the power to continue the *Mareva* injunction after judgment, in aid of execution.

[8] Thus, the law is well settled that a *Mareva* injunction cannot only be granted at the interlocutory stage but may also be granted post-judgment. This court has the statutory power to grant such an injunction by virtue of the provisions of s. 6 of the Schedule to the Courts of Judicature Act 1964. See *Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260 FC. And as pointed out by Edgar Joseph Jr J (later FCJ) in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC, the Rules of Court are not merely rules of practice but have statutory force, and that the court has inherent powers by virtue of O. 92 r. 4 of the ROC to make any order as may be necessary to prevent injustice, and that would include the grant of a post-judgment *Mareva* injunction.

[9] Thus, the court is seized with power to order the extension of an interlocutory *Mareva* injunction after judgment or granted it afresh. And as pointed out by Abdull Hamid Embong J (as he then was) in *Seema Development*, O. 29 r. 1(1) of the ROC specifically provides that an injunction may be made after the trial of a cause or matter, and that would include a *Mareva*. As such, I am of the opinion that when a *Mareva* injunction has been granted during the interlocutory stage, that injunction can be extended post-judgment and there is no necessity to make a fresh application for a post-judgment injunction.

[10] The first and second defendants further argue that the extension of the *Mareva* injunction granted on 8 July 2015 would in effect be a perpetual injunction and that such an injunction would contravene the provisions of s. 54 of the Specific Relief Act 1950. I find this argument to be tenuous. The extension of the *Mareva* injunction is to aid in execution of the judgment. Therefore, when the judgment is satisfied, the injunction will stand to be dissolved. If and when the judgment is satisfied, either defendants may apply to court for an order to discharge the *Mareva* injunction. A large part of the judgment concerns the funds of the fifth defendant that was paid out to both defendants in breach of their statutory and fiduciary duties. There is unjust enrichment on the part of the defendants. Thus, the defendants are liable to account for these funds and disgorge them to the fifth defendant, As the order sought is subject to any further order of the court, it cannot be said to be a perpetual injunction that would be subservient to the statutory constraints of s. 54 of the Specific Relief Act 1950.

[11] The first and second defendants further argue that the application is an abuse of process on grounds that the plaintiff ought to avail itself of the various methods of execution of the judgment as set out in O. 45 of the ROC instead of seeking this post-judgment injunction. In the *Orwell Steel* case a similar argument was raised, and in dismissing that argument, Farquharsan J held that:

> It is true that there are a variety of methods for enforcing execution as set out in RSC Ord 45, r. 1 and once the plaintiff has obtained judgment it may be said that they should pursue the remedies provided by the rules rather than extend the application of *Mareva* injunction still further. The answer to that objection is that, as has been frequently pointed out, the *Mareva* injunction acts *in personam* on the defendant and does not give the plaintiff any rights over the goods of the defendant or involve any attachment of them. In this context it would have the effect of preserving the defendant's goods until execution could be levied on them; and the remedies of injunction and execution take effect side by side.

[12] Thus, it is abundantly clear that a post-judgment *Mareva* injunction that acts *in personam* against the defendants is quite apart from the execution proceedings envisaged in O. 45. Both the post-judgment *Mareva* injunction and execution proceedings can co-exist to the extent that they serve the ends of justice. The plaintiff reiterates that the fifth defendant, being the judgment creditor, is the proper party to execute the judgment and not the plaintiff. However, learned counsel for the plaintiff submits that the plaintiff cannot execute the judgment at the moment, as the plaintiff has not regained control of the fifth defendant. The first and second defendants are still in control of the board and the first defendant being the other shareholder apart from the plaintiff has frustrated all attempts to convene a general meeting to bring about changes to the board's composition.

[13] In this regard, the plaintiff further submits that the first and second defendants are well aware that the plaintiff had filed an originating summons (under Originating Summons No: WA-24NCC-371-09-2016) for a court order to convene an extraordinary general meeting ("EGM") of the fifth defendant, pursuant to s. 150 of the Companies Act 1965. This application was pending adjudication. The plaintiff states that once the plaintiff regains control of the fifth defendant by virtue of the EGM, execution proceedings will be promptly issued. Therefore, the plaintiff submits that this application for the *Mareva* injunction to continue is necessary to aid in the execution of the judgment now and after the plaintiff regains control of the company. I see weight and substance in this argument. The first and second defendants are the architects of their own misfortune. They had brought about huge loss to the fifth defendant through their questionable and unlawful conduct. The first and second defendants are not in a position to dictate when, how and in what manner the execution of the judgment is to be carried out, especially when they are still in control of the fifth defendant's board of directors and are able to thwart any execution of the judgment.

[14] Finally, the first and second defendants submit that the plaintiff has failed to establish the all important element of risk of dissipation of assets by both defendants for the grant of a *Mareva* injunction and as such argue that encl. 140 ought to be dismissed. Again, I find that this argument too is unconvincing. The fact of the matter is that I was already satisfied that there was a real risk of dissipation of assets on the part of the first and second defendants when I granted the *Mareva* injunction on 8 July 2015. The matters raised by the plaintiff as giving rise to the risk of dissipation on affidavit at the interlocutory stage have now been further established by *viva vorce* evidence at trial. Thus, the risk of dissipation is now more real. As was pointed by the learned judge in the *Orwell Steel* case:

> Plainly an injunction will only be granted where the plaintiff can adduce evidence of a kind which normally supports an application for a *Mareva* injunction, namely that there are grounds for believing that the judgment debtor will dispose of his assets to avoid execution. Perhaps such grounds may be more readily established after judgment than before it.

[15] In any event, the risk of dissipation of assets can clearly be presumed from first and second defendants' lack of probity and dishonest conduct in dealing with the assets of the company – see *Multi-Code Electronic Industries (M) Bhd & Anor v. Gordon Toh Chun Toh & Ors* [2009] 9 CLJ 659 where Kang Hwee Gee J held:

> The only other element which the court needs to enquire into is whether there is a risk of dissipation. I accept the reasoning of Greeson CJ in *Patterson v. BTR Engineering (Ault) Ltd and Others* [1989] 18 NSWLR 319 (cited by counsel for the plaintiffs) that "where a *prima facie* case of dishonesty involving diversion of money from its proper channels" is

A made out, "this would justify the conclusion that there was a danger that the appellant would dispose of the assets in order to defeat the judgment".

There could be no question that the monies were withdrawn dishonestly for they were withdrawn without the authority of the Board. The risk of
B dissipation must be presumed under the circumstances.

The law is clear that where there is a lack of probity on the part of the defendants, the court may assume that there is such risk of dissipation. Such lack of probity may arise when monies are withdrawn or paid out without proper authority, as was the case here. See also *Pharmmalaysia Bhd v. Dinesh*
C *Kumar Jashbhai Nagjibha Patel & Ors* [2004] 7 CLJ 465; *Robert Doran & Ors v. Kuan Pek Seng & Ors* [2010] 6 CLJ 105.

[16] The plaintiffs must demonstrate that the defendants' previous actions show their probity is not to be relied upon and that there is a risk that assets will be dissipated. See *Ang Chee Huat v. Thomas Joseph Engelbach* [1995]
D 2 CLJ 893; [1995] 2 MLJ 83; and *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; [1985] 1 MLJ 62. The conduct of the first and second defendants in bringing about large losses to the fifth defendant, which arose from their blatant disregard and breach of statutory and fiduciary duties owed to the fifth defendant. Large
E sums of monies belonging to the fifth defendant were paid out unlawfully to both the first and second defendants. These unlawful conduct of the first and second defendants fortifies the plaintiff's contention that there is apparent risk of assets being dissipated. Further, the judgment orders the first and second defendants to pay damages amounting to approximately RM5.4
F million to the fifth defendant. However, the affidavits deposed by both the defendants on 6 September 2016 shows that they both have collective cash assets of only RM3.5 million. Thus, *prima facie* the risk of dissipation of their assets becomes greater given that judgment has been entered against them and they have been ordered to pay substantial damages.

G **[17]** In the circumstance, I find that the plaintiff has made out a very good case for the *Mareva* injunction to be extended. Wherefore, I allowed prayers (1) to (5) of encl. 140. Cost was fixed at RM3,000.

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